(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: DEC 0 5 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions with post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as a special education math teacher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that she qualifies for classification as a member of the professions holding an advanced degree, or that an exemption from the requirement of a job offer would be in the national interest.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Advanced Degree or Equivalent

The first issue concerns the beneficiary's academic degree or degrees. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(3)(i) states that, to show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of

> letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The petitioner does not claim to hold an advanced degree. Instead, the petitioner claims a bachelor's degree in psychology from in the Philippines; credit toward a master's degree from four different institutions in the Philippines and in the United States; and employment experience at three different schools from 1994 to 2011.

The record establishes the petitioner's past employment experience. With respect to the underlying bachelor's degree, the petitioner submitted an evaluation from SpanTran Educational Services, stating that the petitioner's 1993 degree from is equivalent to a U.S. baccalaureate degree. The petitioner submitted no transcript or other academic record from

The petitioner submitted a transcript from the establishing that she took two semesters of courses there in 2010. The transcript does not establish, and the petitioner does not claim, that the petitioner earned a master's degree at the The transcript is not an official academic record of the petitioner's claimed bachelor's degree.

The director issued a request for evidence (RFE) on July 16, 2012. The director stated: "Submit evidence to establish that the beneficiary has a bachelor's degree from Submit a copy of the beneficiary's official academic record, including transcripts." The director also requested evidence to support her application for the national interest waiver, discussed elsewhere in this decision. The petitioner responded to the RFE, but the petitioner's exhibits did not include the requested academic record. The RFE response included a 16-page statement from counsel, but counsel did not explain the omission of the academic record. Counsel did not address or acknowledge that element of the RFE.

The director denied the petition on March 12, 2013, stating that "the requested transcript was not submitted [in response to the RFE]. No explanation was given for the omission of the transcript. Since the transcript from was not submitted, the evidence does not demonstrate that the petitioner has a bachelor's degree."

On appeal, counsel devotes one paragraph of a 32-page brief to this issue, stating:

> As evidence of her equivalent U.S. advanced degree, the petitioner submitted the Evaluation issued by Spantran Educational Services, Inc[.] granting her the Equivalent Bachelor of Science in Psychology from a regionally-accredited institution of higher education in the United States. With her employment documentation on file, [the petitioner's] 5-year progressive experience has been established without dispute.

The petitioner's employment "experience has been established without dispute," but the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) required the petitioner to submit an official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree. The petitioner did not submit this required evidence, either with the initial filing or in response to an RFE that specifically requested the necessary documentation.

SpanTran did not issue the petitioner's claimed bachelor's degree, and therefore SpanTran is not in a position to issue an official academic record of that degree. The SpanTran evaluation indicated that the documents reviewed for the evaluation consisted of eight semesters of transcripts and a copy of the petitioner's degree. The petitioner has not submitted those materials to USCIS. Under the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(i)(B), the petitioner must submit "an official academic record." A third-party evaluation, stating that such a record exists, does not suffice in this regard.

In response to a request for evidence, all requested materials must be submitted together at one time. Submission of only some of the requested evidence will be considered a request for a decision on the record. 8 C.F.R. § 103.2(b)(11). Where an applicant or petitioner does not submit all requested additional evidence, a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request. 8 C.F.R. § 103.2(b)(14).

The regulation at 8 C.F.R. § 103.2(b)(2)(i) states, in part:

> The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. . . . Secondary evidence must overcome the unavailability of primary evidence.

Here, the petitioner has not demonstrated the unavailability of the required primary evidence. Therefore, USCIS will not accept the SpanTran evaluation as secondary evidence that the petitioner holds the claimed bachelor's degree from .

The director correctly found that the petitioner had not submitted an official academic record of her claimed baccalaureate degree, as required under the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). This finding, by itself, warranted denial of the petition. The petitioner also failed to provide the required evidence in response to the RFE. This is an additional issue that precludes approval of the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner has not overcome this issue on appeal, and the AAO will therefore dismiss the appeal.

National Interest Waiver

The second and final issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. The petitioner cannot qualify for

the waiver without first providing evidence of the required advanced degree or its equivalent. Nevertheless, the director addressed the merits of the petitioner's waiver claim in the denial notice, and therefore the AAO will address that claim here.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dep't of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on January 18, 2012. On that form, the petitioner stated that she intended to work in Baltimore, but she claimed no past experience teaching there, and the record contains no other indication of that intention. The petitioner's only U.S. employer since her 2004 entry into the United States has been approximately 45 miles south-southwest of is in

Part 4, line 6 of Form I-140 asked: "Has any immigrant visa petition ever been filed by or on behalf of this person?" The petitioner answered "No." This answer is not correct. filed a Form I-140 petition on her behalf on August 5, 2008, seeking to classify her as a professional under section 203(b)(3)(A)(ii) of the Act. The petition included an approved labor certification. The director approved the petition on January 29, 2009, with a priority date of December 18, 2007.

In an introductory statement submitted with the petition, counsel stated:

> [The petitioner's] petition for waiver of the labor certification is premised on her bachelor's degree plus at least five (5) years experience, the recognitions and achievements earned through her diligent efforts, and authorship at the website, which was a grant obtained from the Maryland State Department of Education.
>
> It is interesting to note that the performance evaluations about [the petitioner] have always been consistent with the highest Rating of 'Satisfactory.' In fact, [the petitioner] is instrumental in raising dramatically the scores and proficiency of her students during critical years in the Maryland State Assessment Test.
>
> Because of her accomplishments, [the petitioner] is admitted to be among the select and honored members of the prestigious ' [*sic*] since October, 2009.
>
> Aside from helping her school, improvement in the students' performance at the Maryland State Assessment Test, [the petitioner] earned the distinction of conducting the which was sponsored and hosted by

Academic degrees, experience, and recognition for achievements are all elements of an exceptional ability claim under the regulations at 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B), and (F), respectively. Because the threshold for exceptional ability is lower than the threshold for the national interest waiver, evidence of exceptional ability does not necessarily establish eligibility for the waiver.

With respect to the petitioner's "recognitions and achievements," counsel listed 19 "awards and recognitions." Six of these exhibits concern specific elements that counsel singled out above, discussion of which will follow. The remaining exhibits are certificates acknowledging the petitioner's participation in various progress, or expressing general appreciation. The petitioner did not establish the significance of these certificates outside of

Printouts from the UDL pages on web site, mentioned by counsel above, listed the petitioner as one of eleven members of the "Multidisciplinary Team of Developers." The printouts identified the petitioner as the author of two instructional units: a language arts unit called ' and a science unit called '

With regard to the petitioner receiving "the highest Rating of 'Satisfactory,'" documents in the record show that there are only two possible overall ratings: "Satisfactory" and "Unsatisfactory." (Individual rating elements offer an intermediate third rating, "Needs to Improve.") Under this rating regimen, the petitioner's "Satisfactory" ratings do not appear to distinguish her from others qualified to teach at

The petitioner submitted graphs showing her students' performance on the Maryland School Assessment tests, accompanied by a "Certificate of Achievement" that the petitioner received from OHES's principal "at the Maryland School Assessment Staff Meeting" on February 16, 2007, "In Recognition of Distinguished Achievement in Dedication, Commitment and Perseverance During a Critical Year Of School Improvement for Raising Student Achievement." The available evidence shows improvement in the performance of the petitioner's students, but provides no basis for comparison with other teachers at OHES, or more broadly. Improvement in student performance at the local level does not meet the *NYSDOT* national interest guidelines.

A certificate dated October 5, 2009 recognized the petitioner "as an Honored Member" who "has qualified for inclusion in the 2009-2010 edition of the Registry of Executives, Professionals and Entrepreneurs." Counsel described this membership as "prestigious" but the petitioner submitted no evidence to establish this claimed prestige, or to establish the specific requirements for inclusion in the registry. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without further information, the record does not justify the assertion that the petitioner's inclusion in the registry is a reflection of her standing in the field. Her six-digit "Member ID" number is consistent with a large, rather than exclusive, membership.

Regarding counsel's assertion that the petitioner "conduct[ed] the from 2006," the petitioner's own résumé indicated that the petitioner coordinated ' from 2006 to 2008. A biographical sketch of the petitioner, written in the third person but which counsel attributed to the petitioner, stated:

> For two years, [the petitioner] was the of her school whose responsibility was to teach Black History to mostly African American students. This became a club for students who are willing to study more of the Black History and to compete within the school and inter-school. She trained [a] group of students to compete with other students in how much they know their African American History. She organized a quiz bee type of competition to entice and motivate students to study and learn more about Black History and famous people. She was able to bring students to all Maryland School competition about this which gained a lot of experience not only for the students but for the parents as well.

Certificates in the record indicate that the is "sponsored & hosted by " The same certificates acknowledged the petitioner's "effort in conducting the ' in 2006 and 2007. Photographs show the petitioner and some students at a table marked ' ' The record contains no other information about the competition.

Letters from OHES administrators, faculty, and a classroom aide (who was also the parent of a student) attested to the petitioner's skill, dedication, and achievements at OHES. officials attested to the petitioner's activities that affected the entire district. mathematics instructional specialist/special education for stated:

> [The petitioner] has worked as one of the head curriculum writers for the Department of Mathematics in the Division of Curriculum and Instructions for [*sic*] since July of 2006. During this period she has provided a full range of professional development and curriculum writing services to strengthen implementation of the mathematics program for students with disabilities.
>
> [The petitioner] is a resourceful, creative, and knowledgeable educator who has been a major contributor to the Mathematics Department's initiatives to improve achievement in mathematics for students with disabilities. She was the head writer in developing modifications [*sic*] lessons for the math curriculum in grades K-5. Also, she was head curriculum writer for developing curriculum for our Community Reference Instruction Programs which supports students with significant cognitive disabilities, ages 5-21. . . .
>
> In addition, she has assisted the Mathematics Department during the summer months in Teacher Leadership and Professional Development in preparing new special educators with strategies to meet the diverse needs of learners in the teaching of mathematics.

talent development specialist at was a coordinator for the Professional Educator Induction Program (PEIP), which held "sessions that helped new teachers become better acclimated to and prepared for the start of the new school year." She stated: "From 2007 to

2010, [the petitioner] served as a facilitator for the PEIP fifth grade instructional sessions. . . . The Professional Educator Induction Program has consistently benefited from her contributions through the years."

elementary instructional specialist for stated: "As a curriculum and assessment writer, [the petitioner's] abilities are unprecedented. . . . Additionally, [the petitioner] participated as a committee member on the county's Textbook Review Committee in the adoption of Grade 5 textbook."

The letters in the record contain strong praise for the petitioner's abilities and achievements, but no indication that the petitioner's work has had an impact outside of Some witnesses stated that the petitioner had raised the test scores of her students, but there is no evidence that the petitioner's work has resulted in comparable improvement outside her own classroom.

Some of the letters refer to the Department of Labor's debarment of for willful violations under section 212(n)(2)(C)(ii) of the Act, which prohibits the approval of any employment-based immigrant or nonimmigrant petitions filed by between March 16, 2012 and March 15, 2014. OHES teacher for instance, stated:

> I am so disheartened that the students of have to suffer academically because of a human resources error and mistake. . . . It is not only a shame but an embarrassment to the United States Government as well as that those individuals who were wronged financially due to a human resources error are now wronged by having their lives ruined. The ruling did not only affect those international teachers whose visas were expiring but it hurt their colleagues, students, parents and local communities.

By statute, the threshold for the waiver is benefit to the national interest, not a particular employer's inability to petition for a given worker. The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *NYSDOT* at 218 n.5. Furthermore, the debarment does not affect the status of prior petitions approved before the debarment period, such as the petition that filed on the petitioner's behalf in 2008, approved in 2009.

In the July 2012 RFE, the director stated: "The petitioner must establish that the beneficiary has a past record of specific prior achievement with some degree of influence on the field as a whole. The beneficiary's previous influence on the field as a whole must justify projections of future benefit to the national interest." The director also required the petitioner to establish that the benefit from her work would be national in scope. With respect to awards, the director stated that the petitioner must submit evidence to establish their significance.

In response, counsel stated that the petitioner's "profession as 'Highly Qualified Math Teacher' is national in scope and has national-level benefits in improving STEM [science, technology, engineering and mathematics] Education." Evidence submitted in support of this assertion indicated that there is a national crisis in STEM education, but not that any one individual teacher produced national-level benefits toward solving the stated problem. The impact, instead, is collective, which counsel essentially acknowledged with statements such as: "there is a lot of work to be done by 'Highly Qualified' Math teachers like [the petitioner]."

In response, counsel stated:

> Since a 'National Mathematics Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
>
> Further, the curricula used by each state education department in the United States vary from each other.

Counsel's assertion that different jurisdictions use different curricula is not a factor in favor of granting the waiver. Instead, it serves to emphasize the local nature of the petitioner's impact, as stated in *NYSDOT*'s discussion of the "national scope" prong of the national interest test: "while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *Id.* at 217 n.3. Inability to meet the "national scope" prong of *NYSDOT* does not entitle the petitioner to a different standard. The waiver, by nature, is a limited benefit for which not every foreign worker will qualify.

Counsel stated: "it is but harmless to assert that if an NIW [national interest waiver] Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope. But in those cases that are not premised on any prevailing Act of United States Congress, NIW self-petitioners must meet the issue on other bases." Counsel cited no support for this construction of the law. All employment-based immigrant classifications are based on "prevailing Acts of United States Congress," and so is the statutory job offer requirement. Congress could create a blanket waiver through new legislation, and has done so in the past. Section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (Nov. 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Thus, Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*. Congress, to date, has not taken similar action with respect to teachers.

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood

and new ideas." Counsel interpreted this passage to mean that Congress created the national interest waiver for educators. President Bush, however, did not mention the national interest waiver in his remarks; he was discussing the Immigration Act of 1990 as a whole, which included provisions that subject members of the professions (including "scientists and engineers and educators") to the job offer requirement.

Counsel quoted President Obama: "I'm committed to moving our country to the middle to the top of the pack in science and math education over the next decade." Counsel contended that the president has thus "effectively set the critical timeline within which to meet [this] goal. . . . the Chief Executive of the country has himself determined that the national interest would not be served if the petitioner was required to obtain a labor certificate [*sic*] for the proposed employment." Counsel did not establish that granting the waiver to the petitioner would make a difference in meeting "the critical timeline." While the president's remarks represent one of the current administration's policy goals, those words do not supersede standing legislation, regulations and case law.

Citing the petitioner's "over fifteen (15) years of dedicated service," counsel stated that approving the waiver "is certainly economically wholesome to the American nation instead of waiting for about 30 years until U.S. workers become as highly qualified as she is." Counsel did not explain why U.S. workers would require "about 30 years" to reach the level of qualification that the petitioner attained in half that time. Also, this assertion presumes that there are no experienced teachers in the petitioner's specialty in the United States, and therefore it would take decades before any U.S. teacher reaches the level of experience that the petitioner has already attained.

Counsel acknowledged that the job offer/labor certification requirement exists to protect United States workers, but contended that a waiver of that requirement would serve the same ultimate goal, by allowing the petitioner to train "today's students [who] need to be academically competitive to guarantee their employability." Counsel further stated: "today's United States workers or Mathematics Teachers are not as competitive as the foreign teachers who are already in the country since not all of them were educated by 'Highly Qualified Teachers.'" This assertion relies on the presumption that all "foreign teachers" "were educated by Highly Qualified Teachers." Counsel cited no evidence to support that claim, and counsel's claims are not evidence. *See Matter of Obaigbena* at 534 n.2, citing *Matter of Ramirez-Sanchez* at 506.

Counsel asserted "that retaining is more cost effective than recruiting new clients [*sic*]," and therefore "the most practicable approach" is to allow U.S. employers to continue to employ foreign workers whom they have already hired, rather than replace them with new U.S. workers who require additional training. The standard for the waiver of the job offer requirement is the national interest, not what might be most efficient or cost-effective for individual employers. Counsel's proposed standard would effectively create a blanket waiver for all foreign workers currently employed in nonimmigrant status.

Furthermore, many of counsel's assertions rest on the assumption that the labor certification process would displace the petitioner with a U.S. worker. Counsel did not establish that sufficient U.S. workers seek employment as teachers with [redacted] to meet all of that district's recruiting needs. Also,

this line of reasoning disregards the previously approved petition and labor certification. This approval outweighs any speculation about factors that might have prevented the approval.

The petitioner submitted a copy of the *Common Core State Standards Curriculum Framework Progress Guide* for Elementary Mathematics, Grade 1. The petitioner was one of 19 employees who made unspecified contributions to the guide. As counsel acknowledged, each jurisdiction formulates its own curricula. The petitioner did not establish that other districts have used or adapted her work, and therefore the guide does not establish national scope.

In the March 2013 denial notice, the director stated that the petitioner had met only the "intrinsic merit" prong of the *NYSDOT* national interest test, and had not shown that the benefit from her work (as opposed to from the collective effort of all teachers) would be national in scope, or that the petitioner had influenced her field as a whole.

On appeal, counsel questions "the applicability of the 'Matter of New York State Dept. of Transportation[']] to the NIW petitions by 'Highly Qualified Teachers.'" As a published precedent decision, *NYSDOT* is binding on all USCIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c).

Counsel observes that section 203(b)(2)(A) of the Act refers to "the national . . . educational interests . . . of the United States," but the same sentence in the statute indicates that professionals are generally subject to the job offer requirement. Congress also specified that school teachers are professionals, at section 101(a)(32) of the Act. Therefore, Congress specifically indicated that school teachers must meet the job offer requirement, even when they will "substantially benefit prospectively the national . . . educational interests . . . of the United States."

Counsel contends that, because *NYSDOT* lacks a clear definition of the term "national interest," it should apply only in instances where Congress has not provided such a definition. Counsel also claims that, in the case of public school teachers, Congress has provided such a definition by passing the No Child Left Behind Act of 2001 (NCLBA), Pub.L. 107-110, 115 Stat. 1425 (Jan. 8, 2002). The NCLBA proposed to reform the public school system through the employment of "highly qualified teachers." Counsel claims:

> the NCLBA and the Obama Education Programs, taken collectively, provide the underlying context for the adjudication of a national interest waiver application made in conjunction with an E21 visa petition for employment as a Highly Qualified Teacher in the public school sector. . . .
>
> [A] straight-jacket [*sic*] application of NYSDOT constricts, instead of promoting, the national educational interests. In effect, therefore, the United States Congress, with the enactment of the NCLB Act, has preempted the USCIS with respect to the parameters that should guide its determination whether a waiver of the job offer requirement based on national educational interests is warranted. . . .

> The *Matter of New York State Dept. of Transportation* obviously is good in so far as NIW cases filed by Engineers are concerned but does not give justice to other professionals especially since the facts are definitely distinct from each other, not to mention subsequent legislations intended to provide guiding principles to implement Immigration Act of 1990.

Review of the text of the NCLBA does not support counsel's assertions regarding that statute. The NCLBA did not amend section 203(b)(2) of the Act, and it contains no mention of foreign teachers or the phrases "national interest" or "national educational interests." The assertion, therefore, that Congress intended the NCLBA as a means to facilitate the immigration of "highly qualified teachers," or even to define the phrase "national educational interests," is unsupported. Section 203(b)(2)(A) of the Act continues to subject teachers, as members of the professions, to the job offer requirement, and counsel has cited no specific statute, regulation, or case law that amends or supersedes that existing statute.

With respect to "subsequent legislations intended to provide guiding principles to implement Immigration Act of 1990," the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, 105 Stat. 1733 (Dec. 12, 1991) made the national interest waiver available to members of the professions holding advanced degrees, where previously it was available only to aliens of exceptional ability. Following the 1998 publication of *NYSDOT*, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (Nov. 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. These statutes "provide guiding principles" with respect to the national interest waiver. Counsel has identified no other legislation that directly addresses the national interest waiver in this way. In the absence of a comparable provision in the NCLBA or any other education-related legislation, there is no basis to conclude that the legislation indirectly implied a blanket waiver for teachers.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984). The statutory language of section 203(b)(2)(A) of the Act subjects professionals, including teachers, to the job offer requirement. Congress later amended the Act to create a special provision for physicians, but has not yet done the same for teachers.

Counsel states that the director's "decision did not present even one comparative candidate having at least the equivalent accomplishment as that of [the petitioner] to support its determination." The burden of proof rests on the petitioner, not the director. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). There is no presumption of eligibility, and there is no requirement that the director must identify and produce a "comparative candidate" whose qualifications equal or surpass those of the petitioner.

Counsel claims that *NYSDOT* "requires overly burdensome evidence on the qualification [*sic*] of the self-petitioner, identical to EB-1 extraordinary requirements." Counsel, here, refers to the "extraordinary ability" classification at section 203(b)(1)(A) of the Act. That classification requires "sustained national or international acclaim," and the implementing regulations at 8 C.F.R. § 204.5(h)(3) require a petitioner to meet at least three of ten specified standards. The regulatory definition of "extraordinary ability" at 8 C.F.R. § 204.5(h)(2) requires a demonstration that the beneficiary "is one of that small percentage who have risen to the very top of the field of endeavor." The director did not apply that standard to this petition. To say that one has had significant impact on one's field is not the same as saying that one has reached the very top of that field, or has earned sustained national or international acclaim in that field. *NYSDOT* stands as binding precedent and the director did not err by relying on that decision.

Counsel stated that the director, in the request for evidence,

> required vague and overly burdensome evidence more fitting to the cause of an Engineer. USCIS is expected to stipulate clear basis for evidences requested and at least meritoriously rebut the evidences submitted in the initial filing and in the response to Request for Evidence. Here, the Director failed to explain why NCLB was undermined when the law provides the standards to achieve the national educational interest. Unlike in the *Matter of New York State Dept. of Transportation*, United States Congress legislated NCLB to serve as guidance to USCIS in granting legal residence to 'Highly Qualified Teachers.'

The relevant points in *NYSDOT* are not specific to engineers. Counsel's claim that USCIS must "rebut" the petitioner's previously submitted evidence implies that the petitioner's evidence established an initial presumption of eligibility that does not actually exist. Counsel asserted that "the director failed to explain why NCLB was undermined," but counsel identifies no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them. In stating "Congress legislated NCLB to serve as guidance to USCIS," counsel claims knowledge of Congressional intent, but cites no source for this knowledge; the statute itself offers no support for counsel's claim.

Counsel states: "The standard in other words is not national geography but national intellection directed to recapture the nation's economic dominance. This is what is called 'Bridging the Gap.' Syllogistically, hiring 'Highly Qualified Teachers' would produce more graduates than dropouts."

The existence of federal education policy does not give national impact to the efforts of one schoolteacher, and the petitioner has not established that the hiring of one "Highly Qualified Teacher" increases graduation rates. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Counsel cites various Department of Education publications concerning the goals of the NCLBA and other federal programs, but no evidence documenting the results of those

programs a decade after the NCLBA's enactment. Instead, counsel cites recent statistics regarding poor student performance by students in , Maryland, several years after the passage of the NCLBA and several years after the petitioner began working for Eligibility for the waiver rests on the merits of the individual seeking the waiver, and the record does not show that the petitioner has had or will have a nationally significant impact on graduation rates. Being a "Highly Qualified Teacher" under the NCLBA does not establish or imply eligibility for the national interest waiver.

Counsel states:

> USCIS-Texas Service Center has not specified what it meant by 'any contributions of unusual significance that would warrant a national interest waiver.' There is no clarity on this particular requirement and yet, the Director has easily dismissed the incomparable accomplishments of [the petitioner] as submitted in her [*sic*] Case File. By requiring the petitioner to submit evidence of ambiguous nature is 'unduly burdensome' and in effect tantamount to requiring 'impossible evidence' for being extremely subjective.
>
> The lack of clear standard on this particular requirement leaves the finding of insufficiency by USCIS-Texas Service Center highly speculative, without factual basis and rather drawn in thin air.
>
> The mandate for 'flexibility in the adjudication of NIW cases' . . . must be construed liberally rather than strictly compared to the New York State Department of Transportation case. USCIS is now required by United States Congress through the No Child Left Behind Act of 2001 . . . to make it "flexible["] and thus possible rather than impossible in favor of the 'Best Interest of the School Children,' by granting waivers to 'Highly Qualified Teachers' who have already been serving the cause instead of requiring labor certification which may only reveal uncommitted U.S. workers with minimum education qualification.

The petitioner has not submitted evidence to establish that her accomplishments are "incomparable" as counsel claims. After suggesting that the director's decision is "drawn in thin air," counsel asserts that the NCLBA did not merely imply that USCIS should grant the waiver to "highly qualified teachers," it "required" USCIS to do so. Counsel cites no specific section of the NCLBA containing this claimed requirement.

Counsel contends that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers, and asserts: "the USCIS-Texas Service Center should have presented its own comparable worker, if there be any at all," as a basis for comparison against the petitioner. The *NYSDOT* guidelines are not an item-by-item comparison of an alien's credentials with those of qualified United States workers. That decision indicated that

the petitioner must establish a record of influence on the field as a whole. *Id.* at 219, n.6. To do so does not require an invasive review or comparison of other teachers' credentials.

Counsel asserts that the petitioner "has submitted overwhelming evidence" of eligibility, and that "the Director is requiring more from the beneficiary's credentials tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. It is evident from the statute that the threshold for exceptional ability is below, not above, the threshold for the national interest waiver; it is possible to establish exceptional ability but still not qualify for the waiver. Also, the director did not require the petitioner to establish exceptional ability in her field. Instead, the director found that the petitioner's evidence failed to establish that her work has had an influence beyond the school districts where she has worked.

Counsel asserts that 59% of special education teachers hold a master's degree or its equivalent, and that 92% of them hold "full certification." Setting aside the insufficient evidence of the petitioner's degree, these figures indicate that a majority of special education teachers hold credentials comparable or superior to the petitioner's.

Counsel claimed that the labor certification process presents a "dilemma" because "The United States Department of Labor minimum education requirement Report for High School Teacher is just a bachelor's degree," but "the employer is required by No Child Left Behind . . . to employ highly qualified teachers." A bachelor's degree is the highest academic degree that the petitioner claims to hold, and successfully obtained a labor certification on her behalf; no dilemma is evident.

Counsel claims:

> there is more likelihood than not as dictated by experience that replacing 'Highly Qualified Teachers' with those having only minimum qualification that these federally funded schools would fail to meet the high standard required under the No Child Left Behind (NCLB) Law resulting not only [in] closure of these schools but loss of work for those working in those schools.

Counsel identifies no "federally funded school" that has closed as a result of failing to meet NCLBA standards. Attributing this claim to "experience" cannot suffice in this regard. Counsel's claims are not evidence. *See Matter of Obaigbena* at 534 n.2, citing *Matter of Ramirez-Sanchez* at 506. Also, counsel has not shown that awarding the waiver to the petitioner would prevent school closures on a nationally significant scale. The petitioner's approved labor certification and petition have already shown that the labor certification process did not result in the petitioner's replacement.

Congress has established no blanket waiver for teachers based on the overall importance of education; eligibility for the waiver rests on the merits of the individual alien. The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence must be national in scope. *NYSDOT* at 217, n.3. More

specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.").

A plain reading of the statute shows that not every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, such as teaching, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.